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ABSTRACT

There is a growing interest in the field of speech communication by legal educators and a mutual interest in the legal process by communication educators. One dimension of this interest is the development of undergraduate courses that focus on communication in the legal process. One such course is offered at the University of Massachusetts, Amherst, and at the University of Arizona. The three-credit course is offered as an elective to juniors and seniors and is predicated on the belief that lawyers, judges, litigants, and jurors face numerous communication problems on a daily basis. It gives particular attention to the literature related to verbal and nonverbal aspects of communication as they apply to the legal concerns of interviewing, negotiating, and litigating. The course is organized into five units: (1) introduction to communication theory and the legal process, (2) communication theory and practice in interviewing and counseling, (3) communication theory and practice in negotiating and pretrial strategies, (4) communication theory and practice in the trial process, and (5) special topics in judicial communication. (FL)

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TEACHING COMMUNICATION IN THE LEGAL PROCESS

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Abstract

There is a growing interest in the field of speech communication by legal educators and a mutual interest in the lawyering process by communication educators. One dimension of this interest is the development of undergraduate courses which focus on communication in the legal process. This article describes one such course which has been offered both at the University of Massachusetts-Amherst and at the University of Arizona.

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There has been a burgeoning interest in communication skills by members of the bench and bar. Numerous legal educators are recognizing that lawyering requires "a sophisticated awareness of how humans are likely to act or react in any given situation" and "very high-level abilities not only to communicate, but also to perceive the full range of what is being communicated by the parties; and...a good knowledge...of the psychology of communication and persuasion...techniques which can be used in or adjusted to various situations."[1] Books and articles on lawyering skills are borrowing more and more from communications literature.[2] Conferences and workshops for practicing lawyers are making considerable use of communications specialists.[3] And survey after survey tends to support the notion that effective communication skills are essential for those in the legal profession.[4]

In spite of an increasingly widespread belief by many in the legal profession that communication skills are fundamental to the broad spectrum of a lawyer's work, law schools have been unwilling either to develop rhetoric/communication-oriented courses in their own curricula or to require undergraduate courses in speech communication for pre-law students. The strongest known recommendation in this direction is that "communicative skill should be developed before admission to law school" and that much of this skill "is not peculiar to the law and can be taught outside a legal environment."[5] I take this statement to be a rather open invitation to communications faculty to provide opportunities for aspiring lawyers in communication theory and skills development.

Indeed, speech communication educators through their teaching and research have shown an increased interest in lawyering skills. This essay, however, is only indirectly concerned with their research, specifically as it applies to familiarizing instructors who have emerging interests in teaching about communi-

cation skills which are useful to the legal profession. Our main concern here is how the speech communication curricula might adapt to the needs of potential law school students. Certainly interpersonal and small group communication courses are especially useful for legal interviewing, counseling, and negotiating. Public communication and persuasion courses are an excellent means by which to develop skills of expository expression, advocacy, and audience analysis and adaptation. Argumentation courses help students analyze propositions, select materials for case-building and refutation, test evidence and reasoning, cross-examine, and present arguments orally. Closely related to argumentation courses are co-curricular debating teams which can provide "an excellent training ground...for speaking."[6]

In addition to these standard offerings, new courses in legal communication are being introduced all over the country,[7] and "requests for sample syllabi, course materials, bibliographies, and the like are darting from place to place."[8] One such undergraduate course, called "Communication in the Legal Process," was developed at the University of Massachusetts and will soon be offered as well at the University of Arizona. The course was initiated in 1978 and is offered as an elective to juniors and seniors each academic year. It is a three-credit course which draws most of its customers from students pursuing a pre-legal education. Most of the students are majoring in political science, English, history, legal studies, or communication studies. The course is predicated upon the belief that lawyers, judges, litigants, and jurors face numerous communication problems on a daily basis in criminal and civil justice. Particular attention is given to the research literature related to verbal and non-verbal aspects of communication as they apply to the legal concerns of interviewing, negotiating, and litigating.

The class is limited to twenty-five students. We meet each week for two

seventy-five minute sessions, in addition to numerous required outside laboratories. A description of and commentary about the course objectives, units, and assignments is the substance of this article. Organized into five pedagogic units, each will be considered in the order in which it is presented during the semester. The units are: Introduction to Communication Theory and the Legal Process, Communication Theory and Practice in Interviewing and Counseling, Communication Theory and Practice in Negotiating and Pre-Trial Strategies, Communication Theory and Practice in the Trial Process, and Special Topics in Judicial Communication.

Before discussing each of these units, it should be noted at the outset that instructors of any course such as this must begin by thoroughly familiarizing themselves with the legal process and skills need to function well within that process. How might this be done? In my own case, several on-going preparations were necessary since I do not have a law degree. It is important to read as much pertinent literature as possible. Reference books (mostly by practicing lawyers who occasionally collaborate with psychologists) are numerous.[9] Browsing through such journals as the Journal of Legal Education, Litigation, Practical Lawyer, American Bar Association Journal, Trial Diplomacy Journal, and Trial can be quite useful. It also helps to examine the Index to Legal Periodicals, particularly under the heading "Trial Practice." Recent research in the Journal of Communication, Journal of the American Forensic Association, Communication Quarterly (formerly Today's Speech), and other communication quarterlies will provide considerable insight.[10] I also found it quite useful during a recent sabbatical to interview lawyers and judges, to observe interviewing, negotiating, and courtroom activities, and to attend classes at several law schools and continuing legal education clinics where skills courses are being offered. If speech communication professors are willing

to undertake this kind of re-tooling, they can no doubt perceive how what they have been teaching in their courses for years can relate to various legal settings. Even then, speech communication instructors are not prepared to teach "the law," nor should they make any attempt to do so. That is a task which should be left to the legal experts. What speech communication professionals are prepared to do, however, is to teach pre-law and other interested undergraduates how to sharpen certain communication and theoretical skills which will prove useful whenever and if ever they take part in some aspect of our judicial system, be it as lawyers, judges, clients, or jurors.

Unit One: Introduction to Communication Theory and the Legal Process

My aim in the first few classes is to orient the students to the course, to the legal profession, and to the nature of the American judicial system. I talk in cursory fashion about the size of the legal system, what a lawyer does in his/her job, how a lawyer is trained to develop various lawyering skills, the kinds of careers law school graduates pursue, and the machinery of justice in the United States. I also require the students to read textbook chapters and articles which will refresh their understanding of processing criminal and civil cases.[11]

We also turn our attention to a consideration of the relationship between legal matters and rhetorical/communication theory and research. A quick survey of the history of and similarities in rhetorical education and legal education is presented using the lecture method. In addition, we take a look at some of the classic research which links both disciplines (e.g., Kalven and Zeisel's The American Jury).[12] The first course unit is the shortest unit and is designed to create an appropriate overall atmosphere for the remainder of the semester.

Unit Two: Communication Theory and Practice in Interviewing and Counseling

The legal interview involves a consideration of fact-gathering, advising, and counseling. In each of these areas, an attempt is made to make the student aware of the verbal and non-verbal factors which play a role in the success or failure of the interactions. Students are exposed to the philosophy that the interview and counseling situation is a get and give situation--the lawyer's primary goal is to secure facts and interpretations of the case, while at the same time, giving clients various items of information and advice. To accomplish this, theories of dyadic communication are applied to client, witness, and lawyer relationships.[13]

We initially look at the nature of dyadic communication. For instance, how do proximity, informality, and simultaneous message exchange affect the quality of an interview? Barriers between lawyer and client such as socio-economic status, educational status, race, sex, and emotional stress are considered in some detail because of the potential they have to distort the legal interview. We also consider how physical and vocal cues affect the interview, what constitutes appropriate feedback, and the elements of linguistic, role, and environmental influence such as the arrangement and appearance of the law office. All of these matters are analyzed from the point of view of reducing client or witness anxiety, while at the same time, maximizing the ability of an attorney to gather facts.

Students read material by psychologists, lawyers, and interpersonal communication theorists on the stages of a successful lawyer-client interview. They also participate in short classroom exercises on maintaining topic control through the use of a funnel sequence and appropriate probes. Finally, we look at the nature of legal counseling and the kinds of advice lawyers generally do and do not give. By the end of the unit, the student should understand how an

effective lawyer establishes rapport in a legal interview.

The oral assignment which caps this unit is a role-play interview in which the student attorney is asked to demonstrate awareness of his or her own perceptual sets and projections. The exercise closely follows a procedure used by the American Bar Association Law Student Division in its Client Counseling Competition.[14] The class is divided into triads for the purpose of conducting hypothetical client interviews. Two students act as lawyers and the third plays the client. A few days before the assignment, each two-member team receives a consultation problem which is a very brief memorandum similar to that which a legal secretary might present to his or her employer. Meanwhile, the client is given a confidential, detailed profile of his or her role. On the day of the assignment, a thirty minute consultation is held in front of the class in which the student lawyers are expected to elicit the relevant information, outline a problem, and propose (a) solution(s) for resolving the problem. During a fifteen-minute post-consultation period, the lawyers and client give their impressions and general feelings about the interview. This is then followed by an instructor and class critique which focuses on the extent to which the goals of the interview have been met and the communication skills which have or have not been displayed. Rather than scheduling everyone during regular class meeting time, and in order to have everyone in the class assume the role of student lawyer, several outside laboratory appointments are arranged. The mock interview constitutes 10% of the student's final grade.

Unit Three: Communication Theory and Practice in Negotiating and Pre-Trial Strategies

Most legal cases never evolve into a courtroom experience. It is therefore important for the student to achieve some measure of competence in negotiation and pre-trial strategies. With this in mind, students are exposed to the verbal and non-verbal aspects of conflict resolution, including work in various

types of small group situations and face-to-face interactions demanded by the goal of arbitration and compromise.[15]

Seven topics are covered in this unit. First, students are presented with a rationale for negotiating and an explanation as to how negotiation operates within our legal system.[16] Second, we review the literature on conflict and conflict resolution, relying heavily on an application of dyadic and small group communication research as it applies to the resolution of disputes.[17] Third, students are asked to discover and discuss in class concrete ways in which lawyers can use conflict resolution theory to negotiate cases.[18] Fourth, we examine two specific areas of legal negotiation--judicial diversion and plea bargaining. Fifth, we make an analysis of investigation methods and the gathering of real evidence and oral testimony. An important communication dimension of fact-gathering is witness perception and memory.[19] Sixth, an analysis of discovery techniques is made looking closely at the language, style, organization, and analysis of issues.[20] The seventh consideration is the pre-trial conference and how it too can be used to resolve disputes (solve problems).[21]

The major assignment here, worth 20% of the student's final grade, is an oral and written exercise in negotiating a civil settlement. A consumer fraud case study based upon actual public interest litigation is used.[22] Students are asked to read their way through the case very slowly, over a period of days. They are urged to place themselves in the shoes of the attorneys. How would they, as the attorneys, decide certain strategic and tactical questions? Dozens of communication questions lurk unidentified throughout the mosaic of this case. As the student reads the case, s/he is asked to answer these questions in writing. The questions are designed to relate the dyadic and small group communication theory to this particular legal matter. For the most part, questions of law are not considered since this is not the focal point of the course.

After a period of approximately two weeks, and assuming each student has finished the written part of the assignment, the students are divided into groups. Some assume the role of defense lawyers for the bank; other represent the complainant who is claiming consumer-fraud regarding dance lessons. Several groups with teams of two lawyers for each side are operating simultaneously. They are asked not to discuss what they are doing with students in the other negotiating groups until the assignment has been completed by everyone. I ask each group to make certain assumptions about the status of the particular case.[23] Then I send them off to negotiate outside class. The students representing the complainant who obtain the largest settlement (relative to all the other students representing complainants in the other groups) receive a bonus to their grade on the assignment. Similarly, the students representing the defendant who obtain the smallest settlement receive the same grade bonus. Groups that fail to settle are ineligible for the award. Within a week, each group submits a signed paper containing any settlement to which they have agreed. Also, each individual class member submits the answers to the questions asked prior to their negotiating as well as a commentary in which s/he describes the communication dynamics of the negotiations. Students take this assignment very seriously, get involved in tough bargaining with each other, and generally write very perceptive papers concerning their group's behavior.

Unit Four: Communication Theory and Practice in the Trial Process

Without doubt the strongest beacon which interests people in the legal profession is their concept of litigation. It is, in the eyes of most people, the sine qua non of lawyering. Yet, even for many practicing lawyers, it remains an enigma largely because they have failed to explore the various phases of the trial process with an eye toward determining the precise role of communication in each phase. Students in this course are asked to reflect upon communications

in various phases of the trial dialogue: attorney-judge, attorney-attorney, attorney-client-witnesses, attorney-jury, witness-jury, defendant-jury, jury-jury, and judge-jury. In each instance, verbal and non-verbal factors interact to produce the final experience. Students are asked to attend to these factors in the trial process. Since most of the literature on communication and law is on this subject, the majority of course time is spent on litigation.

At some point during this unit, a mid-term examination is given to the students which accounts for another 20% of their total mark. There are no additional oral exercises such as those described in the units on interviewing and negotiating. This does not reflect a lack of desire for exercises in courtroom advocacy, but rather a lack of time in one semester to have the students engage in simulated trial practice. Another course in our curriculum, "Argumentation," does, however, afford that opportunity. Unit Four is divided into seven topics which are considered in the following discussion.

(1) An introduction to the trial. We begin the unit with some general observations about such matters as whether a jury trial or a judge trial is preferable and we look at bench trials and jury trials as communication/persuasion models. Several pertinent readings from Rita Simon's works are assigned[24] and a videotape of a trial is seen and discussed.[25]

(2) Voir dire. Following a discussion of the representativeness of the venire, we launch into jury selection matters such as the kinds of questions which can be posed to the potential jurors, the strategy that should be employed by the questioners, the conduct of the examiner, and how the voir dire can uncover juror bias. Audience analysis research on sex, age, occupation, and ethnic and racial characteristics can help determine the most desirable jurors. Part of our activity here is to create hypothetical situations (e.g., the plaintiff is a child whose parents are claiming personal injuries) after which

we seek out social science research which will help us to find ideal jurors.[26] We also analyze specimen voir dire from local official court transcripts and from some cases where vast amounts of research on potential jurors has been done (e.g., the Angela Davis and the Harrisburg Seven Cases).[27] Students soon recognize that preparation for voir dire must be done with utmost care.

(3) Opening statements. Here is an ideal topic to apply theories of expository speaking and, to some extent persuasive speaking, to the courtroom. Students consider the goals of opening statements, the content of opening statements, techniques of presentation such as narrative style, attention factors, and delivery, what steps should be taken in preparing an opening statement, and the importance of the opening statement in the overall trial.[28] This last topic allows us to review the literature on primacy from which some students conclude that there may indeed be some advantage to delivering the first remarks in a trial.[29]

(4) Examination of witnesses. Looking at witness testimony is a marvelous way to illustrate the uncertainties and tensions during any trial. After an introductory explanation of trial procedure and the nature, admissability, and form of legal evidence, the student is ready to explore communication strategies in direct examination, cross-examination, and raising objections. There is an abundance of good literature on the credibility of evidence sources.[30] Within this topic, students find it especially fascinating to consider the coaching of witnesses for direct examination. The film, "The Shooting of Big Man," is called again to our attention since there was a considerable amount of defendant coaching shown. One of the course handouts distributed at this point deals with how an attorney can handle various kinds of problem witnesses. Throughout the treatment of this topic, samples of witness questioning are presented in class and evaluated by the students.

(5) Closing arguments. To many, the most obviously persuasive part of a jury trial is the summation. As a result, this topic is ideal for linking the courtroom context to appropriate theories, principles, and research findings concerning argumentation and persuasion. In developing this topic, we examine the purpose of closing statements, how a lawyer should prepare a closing statement, the content of the closing argument for both the prosecutor or the plaintiff and the defense, how a closing statement should be organized, the role of emotional appeal, the delivery of closing argument, and a review of recency literature.[31] Students read and analyze specimen closing arguments as a means of learning principles of argumentation and persuasion.

(6) Trial judge communication. Although other aspects of trial judge communication are briefly considered, this topic is aimed mostly at judge instructions to the jury. We evaluate the merits and disadvantages of patterned or uniform instruction-giving. Juror comprehension is analyzed as we look at some of the research done on this subject.[32] We also take note as to how the directed verdict and the Allen Charge affect communications between judge and jury and among jurors in the jury room.[33] Finally, we evaluate the oral presentations of some judges giving instructions to the jury. Comments tend to focus on the judge's language, organization, voice, brevity, and redundancy.

(7) Jury deliberation. Small group communication theory is rigorously applied to this final topic in Unit Four.[34] We begin this topic by examining and evaluating some of the pre-deliberation communication limitations placed on jurors, such as not allowing jurors to ask questions of witnesses while a trial is in progress.[35] We further examine the advantages and disadvantages of having the jury take notes during the trial proceedings.[36] We then shift our thinking from the courtroom to the jury room and look at small group communication as it applied to (a) hung jury discussions,[37] (b) nonunanimous versus unanimous verdict discussions,[38] and (c) the size of the jury.[39] Because so

much of this topic depends on using social science research on jury behavior, we pause to locate common methodologies and evaluate the research overall.[40] Finally, we look at research on specific elements of jury deliberation such as the role and importance of the foreperson,[41] confusion in the deliberation process and the degree of juror misunderstanding,[42] credibility of the lawyer and jury decisions, credibility of witnesses and jury decisions, the sex of jurors as a variable in deliberations, the occupation and education of jurors as variables in deliberations, prior jury experience as a variable in deliberations, ethnic background of jurors as a variable in deliberations, juror personality and jury deliberations, what role evidence plays in jury deliberations, and the number and severity of decision alternatives as related to jury decisions.[43]

A written assignment, worth 20% of the student's grade, is inserted between the trial judge communication and jury deliberation topics in Unit Four. Students are asked to view (outside class and on library reserve) a two hour videotape of the simulated trial, People vs. Burks.[44] This is a criminal case involving the trial of a defendant accused of rape. The complaining witness was allegedly raped in the hallway of her apartment building at gun point and identifies the defendant as the man who raped her. Both attorneys are nationally prominent criminal lawyers. Remarks on certain procedures throughout the trial are interspersed in the tape by The Honorable Alan E. Morrill. Students consult their readings and class notes in answering designated quesions about this case. The questions come from the material covered in Unit Four dealing with opening statements, examination of witnesses, closing arguments, and trial judge communication.[45]

Unit Five: Special Topics in Judicial Communication

Three additional topics are addressed at the end of the course since there are numerous important communication dimensions to each of them. The three

topics are appellate court advocacy, nonverbal communication in legal settings, and videotaping in the legal system.

(1) Appellate court advocacy. This topic becomes a study of justificatory argumentation and rhetoric in judicial appeals and opinions. It allows the student to analyze the written appellate brief from the standpoint of argument, arrangement, and style,[46] to criticize oral arguments by attorneys according to rhetorical principles,[47] and to look at judicial decisions at the appellate level.[48]

(2) Nonverbal communication in legal settings. Although nonverbal communication was noted several times during the course, it now is time to isolate this aspect of communication in the legal setting and to look at it in greater depth. We begin by mapping out a theory of nonverbal communication to recognize its importance in legal and other settings. Special attention is given to proxemics, kinesics, vocal cues acting as paralanguage, and certain physical characteristics as they relate to communicating messages to people.[49]

(3) Videotaping in the legal system. We end the semester by reflecting on the uses and effects of videotaping in legal settings. For approximately twenty years television has been used to aid investigation, to preserve testimony, to obtain a complete record of an actual trial, and to conduct communications research in legal settings. There has been opposition to its use based on problems with equipment, procedure, source credibility, courtroom dignity, high cost, and possible infringement of the Constitution. Nevertheless, television is being used more and more because there are individuals who attest to its many advantages such as convenience, accuracy, research value, and ability to save court time. Arguments for and against videotaping come under close scrutiny by the students enrolled in class. They also are asked to think about the possibility of broadcasting trials for general public consumption. To help formulate their opinions, students are presented with available research findings

regarding the use and effect of television in various legal settings.[50]

There are two additional assignments at the end of the course which deserve comment. At some point near the end of Unit Four and the beginning of Unit Five, students are taken to a nearby district court and given an opportunity to watch the court in action. During this same field trip visit, a judge, prosecutor, and defense counsel present a symposium on communication skills in the legal profession. Students are given opportunities to pose questions to the three individuals and most of these questions stem from what we have covered in the course. A week after the visit, the students are asked to submit a report in which they evaluate what they saw in court and what the three "professionals" said. The report is worth 10% of the student's final grade.

A final examination worth 20% of the student's grade completes all work in the course. Half the examination is based on questions from Unit Five, while the remaining part of the examination is an application of the student's knowledge of jury deliberations to their own participation in such a deliberation. I have the students serve as jurors for a mock trial which is part of a final examination for third year law students who are enrolled in a course in Trial Advocacy at a nearby law school. The trial usually takes one day (a Saturday or Sunday). My students see the full trial, retire to the jury room to deliberate, and then return to the courtroom with a verdict. The trial and their deliberations are videotaped. During the final examination period, they prepare an analysis of their deliberations based on the topics discussed in Unit Four. They submit this analytical paper at the time they take the final examination on Unit Five topics.

It is my belief that the "Communication in the Legal Process" course is an effective means of providing an introduction to lawyering as a profession where communication skills are vital. A sensitivity to speech communication is not something that is always clearly developed by students in law school. So, it is

enlightening for the pre-law student to look at the legal process from this perspective. This course does not pretend to maximize communication competencies in the students, nor does it help students to learn about the law. Those activities are left up to a more broad-based communication education and work in law school. Nevertheless, I believe that the students gain a preliminary insight into both communication/rhetorical theory and the legal process which is unique in undergraduate education.

FOOTNOTES

[1] Gary S. Goodpaster, "The Human Arts of Lawyering: Interviewing and Counseling," Journal of Legal Education, 27 (1975), 22.

[2] For instance, see Gary Bellow and Bea Moulton, The Lawyering Process: Materials for Clinical Instruction in Advocacy (Mineola, New York: Foundation Press, 1978), Chapter 7. This section is entitled "Argument: The Turn to Authority." The preliminary perspectives in the chapter are borrowed from books on rhetoric by Winterowd and Clark. They treat ethical concerns, pathetic concerns, logical concerns, audience analysis, argument selection, organization, and presentation--the classical canons of rhetoric.

[3] A March, 1980 conference sponsored by the Institute for the Study of the Trial in Orlando, Florida, brought together justices, attorneys, psychiatrists, speech communication professors, and debate coaches to discuss the application of innovative social science techniques to the courtroom. Factors influencing the speaker, message, and audience were analyzed to aid trial lawyers in preparing and presenting their cases. Special attention was given to the ways an attorney can maximize the communication effectiveness between the advocate and the judge/jury.

[4] See Deedra Benthall-Nietzel, "An Empirical Investigation of the Relationships Between Lawyering Skills and Legal Education," Kentucky Law Journal, 63 (1975), 373-397.

[5] Thomas H. Adams, in The Law Schools Look Ahead: 1959 Conference on Legal Education (Ann Arbor: University of Michigan Law School, 1959), p. 155.

[6] Prelaw Handbook (Princeton, New Jersey: Association of American Law Schools and the Law School Admission Council, 1978), p. 18.

[7] The objectives of the "Legal and Judicial Communication" course taught at Howard University are (a) to understand the interaction between communication and the legal system; (b) to comprehend the trial and jury process in light of the insights of communication theory; and (c) to examine the art of advocacy as it is practiced in the courts. The objectives of a course in "Argumentation and Persuasion in Courts of Law" taught at San Jose State University are (a) to trace the evolution of trial by jury; (b) to compare and contrast the different methods of argument used in summary proceedings before a magistrate, in front of a jury, in the appellate process, and in quasi-judicial hearings; and (c) to study trial transcripts as an institutionalized mode of channeling confrontations between individuals and the state. The objective of a course in "Judicial Communication" taught at Drake University is to focus on the communication skills and communication questions which lawyers-judges-litigants-jurors face in criminal and civil justice. Finally, the "Communication and the Law" course at Loyola University of Chicago is intended to survey the communication research related to law enforcement, corrections, and the judicial process. By the end of the course, the students should (a) have an understanding of legal communication research methods; (b) have an understanding of how communication skills training can assist criminal justice employees; (c) have an understanding of the communication variables affecting lawyers' decision in their jury selection process; (d) have an understanding of the effect of using videotape in the courtroom; (e) have an understanding of the effect of communication variables on the juror's decision-making process; and (f) have the ability to use communication skills effectively to interview, negotiate, and persuade in a simulated courtroom setting, and have the ability to assess these skills in others.

[8] Richard D. Rieke, "The Role of Legal Communication Studies in Contemporary Departments of Communication," an unpublished paper, p. 1.

[9] See American Jurisprudence, Trials (San Francisco: Bancroft-Whitney, 1964), Volx. 1-6; Bellow and Moulton (see fn. 2); Paul Bergman, Trial Advocacy in a Nutshell (St. Paul: West Publishing, 1979); Gordon Bermant, Charlan Nemeth, and Neil Vidmar, eds., Psychology and the Law (Lexington, Massachusetts: Lexington Books, 1976); Harry S. Bodin, Civil Litigation and Trial Techniques (New York: Practicing Law Institute, 1976); Francis Xavier Busch, Trial Procedure Materials (Indianapolis: Bobbs-Merrill, 1961); Al J. Cone and Verne Lawyer, The Art of Persuasion in Litigation (Des Moines: Dean Hicks, 1966); Ronald C. Dahl and Robert Davis, Effective Speaking for Lawyers (Buffalo: William S. Hein, 1969); Jerome Frank, Courts on Trial (Princeton, New Jersey: Princeton University Press, 1973); Richard A. Givens, Advocacy: The Art of Pleading a Cause (Colorado Springs: Shepard's/McGraw-Hill, 1980); Kenney F. Hegland, Trial and Practice Skills in a Nutshell (St. Paul: West Publishing, 1978); Hebert Hickam and Thomas M. Scanlon, Preparation for Trial (Philadelphia: Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 1963); Grace Holmes, ed., Excellence in Advocacy (Ann Arbor: The Institute of Continuing Legal Education, 1971); Grace Holmes, ed., Persuasion: The Key to Damages (Ann Arbor: The Institute for Continuing Legal Education, 1969); Robert E. Keeton, Trial Tactics and Methods (Boston: Little, Brown, and Co., 1973); Herbert A. Kuvin, Trial Handbook (Englewood Cliffs, New Jersey: Prentice-Hall, 1965); Lewis W. Lake, How to Win a Lawsuit Before Juries (New York: Prentice-Hall, 1954); James Marshall, Law and Psychology in Conflict (Indianapolis: Bobbs-Merrill, 1966); Alan E. Morrill, Trial Diplomacy (Chicago: Court Practice Institute, 1972); Walter Probert, Law, Language and Communication (Springfield, Illinois: Charles C. Thomas, 1972); Henry B. Rothblatt, Successful Techniques in the Trial of Criminal Cases (Englewood Cliffs, New Jersey: Prentice-Hall, 1961); Bruce D. Sales, ed., Psychology in the Legal

Process (New York: Spectrum Press, 1977); and Robert L. Simmons, Winning Before Trial (Englewood Cliffs, New Jersey: Executive Reports Corporation, 1974), Vols. 1-2.

[10] Consult Ronald J. Matlon, Index to Journals in Communication Studies Through 1979 (Annandale, Virginia: Speech Communication Association, 1980).

[11] One textbook occasionally required is Rita James Simon, ed., The Jury System in America (Beverly Hills, California: Sage Publications, 1975). The first chapter, "Aspects of American Trial Jury History," provides some excellent background material. A newer version of essentially the same book is Simon, The Jury: Its Role in American Society (Lexington, Massachusetts: Lexington Books, 1980).

[12] Harry Kalven, Jr. and Hans Zeisel, The American Jury (Boston: Little, Brown, and Company, 1966).

[13] Initially I reviewed the literature in speech communication and psychology pertaining to interviewing and counseling. After preparing a compendium of advice, I superimposed what was relevant on advice from the following literature pertaining to the legal interview. See Harrop Arthur Freeman and Henry Weihofen, Clinical Law Training: Interviewing and Counseling (St. Paul: West Publishing, 1972); Goodpaster (see fn. 1); Raymond L. Gorden, Interviewing: Strategy, Techniques, and Tactics (Homewood, Illinois: Dorsey Press, 1969); Stanley E. Jones, "Directivity vs. Nondirectivity: Implications of the Examination of Witnesses in Law for the Fact-Finding Interview," Journal of Communication, 19 (March, 1969), 64-75; Mark K. Schoenfield and Barbara Pearlman Schoenfield, "The Art of Interviewing and Counseling," Practical Lawyer, 24 (January 15, 1978), 67-74, (March 1, 1978), 41-59; Andrew S. Watson, The Lawyer in the Interviewing and Counseling Process, (Indianapolis: Bobbs-Merrill, 1976).

[14] The Client Counseling Competition was conceived and developed as a legal teaching technique by Professor Louis M. Brown of the University of Southern California Law Center. It was originally called the Mock Law Office Competition. It has been held each year since 1969 with the American Bar Association's Law Student Division administering the competition since 1973. The purpose of the competition is to promote greater knowledge and interest among law students in the counseling functions of law practice and to encourage students by contest awards to develop interviewing, planning, and analytical skills in the lawyer-client relationship in the law office.

[15] In addition to pertinent literature on small group communication in our field and in chapters in the books noted in fn. 9, see Wilfred Lorry, A Civil Action: The Trial (Philadelphia: Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, 1959) and George Vetter, Successful Civil Litigation (Englewood Cliffs, New Jersey: Prentice-Hall, 1977).

[16] Harry T. Edwards, Problems, Readings, and Materials on the Lawyer as a Negotiator (St. Paul: West Publishing, 1977); Denton R. Moore and Jerry Tomlinson, "The Use of Simulated Negotiation to Teach Substantive Law," Journal of Legal Education, 21 (1969), 579-586; and David H. Smith, "Communication and Negotiation Outcome," Journal of Communication, 19 (September, 1969), 248-256.

[17] See Gary Bellow, Conflict Resolution and the Lawyering Process (Mineola, New York: Foundation Press, 1971) and Gerald I. Nierenberg, The Art of Negotiating (New York: Simon and Schuster, 1971).

[18] What students commonly discover is that lawyers are advised to negotiate on their own turf, balance or slightly outnumber the other side with negotiators, try to anticipate the strategies, strengths, and weaknesses of an opponent,

designate a "demand" as a precondition for negotiation, make the other side tender the first offer, make the first demand relatively high, raise demands as they make concessions, and put the final agreement in writing themselves if at all possible.

[19] Guy O. Kornblum, "The Oral Civil Deposition: Preparation and Examination of Witnesses," Practical Lawyer, 17 (May, 1971), 11-35. Articles and books on human memory to compliment the Kornblum essay are numerous.

[20] William A. Glaser, Pretrial Discovery and the Adversary System (New York: Russell Sage Foundation, 1968). The information in this book is plugged into our writings on evidence which appear in most argumentation textbooks.

[21] "Pretrial Conference Procedures," South Carolina Law Review, 26 (1974), 481-523.

[22] The case study used is "The Case of the Ballroom Banker." It can be found in Michael Meltsner and Philip G. Schrag, Public Interest Advocacy: Materials for Clinical Legal Education (Boston: Little, Brown, and Company, 1974).

[23] For instance, students are to assume that, should the case go to trial, it has been assigned to a judge thought to be sympathetic to consumers, and that if the case gets to trial, the question of the amount of punitive damages will, if any, go to a jury.

[24] See citations in fn. 11.

[25] We view the ABC-TV program, "The Shooting of Big Man: Anatomy of Criminal Case." This documentary begins with a meeting between the defendant and his two lawyers and is an unusual behind-the-scenes look at a complete criminal case. Students are asked to pay particular attention to certain communication strategies. The videotape is available from Evidence Films,

12 Arrow Street, Cambridge, Massachusetts, 02138.

[26] In addition to the references in fn. 9, see Hayward R. Alker, Jr., Carl Hosticka, and Michael Mitchell, "Jury Selection as a Biased Social Process," Law and Society Review, 11 (Fall, 1976), 9-41; Joseph T. Karcher, "The Importance of the Voir Dire," Practical Lawyer, 15 (December, 1969), 59-66); Alan E. Morrill, "Voir Dire Examination," Insurance Law Journal (March, 1968), 190-234; Alice M. Padawer-Singer, Andrew Singer, and Rickie Singer, "Voir Dire by Two Lawyers: An Essential Safeguard," Judicature, 57 (April, 1974), 386-391; Robert S. Redmount, "Psychological Tests for Selecting Jurors," Kansas Law Review, 5 (1957), 391-403; Robert C. Sorensen, "Juror Selection and the Behavioral Sciences," Litigation, 2 (1975/1976), 30-34; and Eugene Tate, Ernest Mawrish, and Stanley Clark, "Communication Variables in Jury Selection," Journal of Communication, 24 (Summer, 1974), 130-139.

[27] Jay Schulman, Philip Shaver, Robert Colman, Barbara Emrich, and Richard Christie, "Recipe for a Jury," Psychology Today, 6 (May, 1973), 37-44, 77-84.

[28] In addition to the references in fn. 9, see Frank E. Haddad, Jr., "The Criminal Case: The Opening Statement," Trial, 10 (October, 1979), 34-35, 41, 60.

[29] Robert G. Lawson, "The Law of Primacy in the Criminal Courtroom," Journal of Social Psychology, 77 (1969), 121-131; Robert G. Lawson, "Order of Presentation as a Factor in Jury Persuasion," Kentucky Law Journal, 56 (Spring, 1967-1968), 523-555; and Vernon A. Stone, "A Primacy Effect in Decision-Making by Jurors," Journal of Communication, 19 (September, 1969), 239-247.

[30] In addition to the references in fn. 9 and sections of argumentation books devoted to questioning, see John A. Burgess, "Principles and Techniques of Cross-Examination," Trial Diplomacy Journal, 2 (Winter, 1979), 19-23;

Edward W. Cleary, "Evidence as a Problem in Communicating," Vanderbilt Law Review, 5 (April, 1952), 277-294; Mason Ladd, "Some Observations on Credibility: Impeachment of Witnesses," Cornell Law Quarterly, 52 (Winter, 1967), 239-261; and Jack B. Weinstein, "The Examination of Witnesses," Practical Lawyer, 23 (March, 1977), 40-49.

[31] In addition to the references in fn. 9, see Melvin M. Belli, "Techniques of Final Argument," Trial Diplomacy Journal, 2 (Winter, 1979), 34-39; Roy C. Brock, "Closing Argument for the Defendant," Federation of Insurance Counsel Quarterly, 26 (Winter, 1976). 145-151; John P. Miller, "Opening and Closing Statements from the Viewpoing of the Plaintiff's Attorney," Practical Lawyer, 10 (October, 1964), 84-94; Stanley E. Preiser, "The Criminal Case: Tips on Summation," Trial, 15 (October, 1979), 48-49, 53-55, 68; and Lawrence J. Smith, Art of Advocacy: Summation (New York: Matthew Bender, 1978).

[32] In addition to the references in fn. 9, see Raymond W. Buchanan, Bert Pryor, K. Phillip Taylor, and David U. Strawn, "Legal Communication: An Investigation of Juror Comprehension of Pattern Instructions," Communication Quarterly, 26 (Fall, 1978), 31-35; Robert F. Forston, "Judge's Instructions: A Quantitative Analysis of Jurors' Listening Comprehension," Today's Speech, 18 (Fall, 1970), 34-38; Susan A. Henderson, "Pattern Jury Instructions," Judicature, 52 (March, 1969), 339-342; Jack Pope, "The Judge-Jury Relationship," Southwestern Law Journal, 18 (1964), 46-69; and Kenneth M. Wormwood, "Instructing the Jury," Defense Law Journal, 15 (1966), 1-28.

[33] Earl Ledford, "Defusing the Dynamite Charge: A Critique of Allen and Its Progeny," Tennessee Law Review, 36 (Summer, 1969), 749-762 and Gary Orloff, "Future Renditions of Allen-Type Charges Must Conform to the Standard Approved by the American Bar Association," Houston Law Review, 9 (January, 1972), 570-578.

[34] In addition to the references in fn. 9, the Kalven and Zeisel work (see fn. 12), and several chapters in both works by Simon (see fn. 11), a very fine overall work on juries is Michael J. Saks, Jury Verdicts (Lexington, Massachusetts: D.C. Heath and Company, 1977).

[35] Lisa M. Harms, "The Questioning of Witnesses by Jurors," American University Law Review, 27 (Fall, 1977), 127-160.

[36] Dragan D. Petroff, "The Practice of Jury Note Taking: Misconduct, Right, or Privilege?" Oklahoma Law Review, 18 (May, 1965), 125-141 and Edwin L. Scherlis, "Note Taking by Jurors," Temple Law Quarterly, 37 (1963-1964); 332-341.

[37] Leo J. Flynn, "Does Justice Fail When the Jury is Deadlocked?" Judicature, 61 (September, 1977), 129-234.

[38] Ruth B. Ginsburg, "Special Findings and Jury Unanimity in the Federal Courts," Columbia Law Review, 65 (1965), 256-271 and Laird C. Kirkpatrick, "Should Jury Verdicts be Unanimous in Criminal Cases?" Oregon Law Review, 47 (June, 1968), 417-429.

[39] William E. Arnold, "Membership Satisfaction and Decision Making in Six Member and Twelve Member Simulated Juries," Journal of the American Forensic Association, 12 (Winter, 1976), 130-137; Joan B. Kessler, "An Empirical Study of Six- and Twelve-Member Jury Decision-Making Processes," Journal of Law Reform, 6 (Spring, 1973), 712-734; David M. Powell, "Reducing the Size of Juries," Journal of Law Reform, 5 (Fall, 1971), 87-108; Edward Thompson, "Six Will Do!" Trial, 10 (November/December, 1974), 12, 14; and Hans Zeisel, "Twelve is Just!" Trial, 10 (November/December, 1974), 13, 15.

[40] Howard S. Erlanger, "Jury Research in America," Law and Society Review, 4 (February, 1970), 345-370 and Kathleen Carrese Gerbasi, Miron Zuckerman, and

Harry T. Reis, "Justice Needs a New Blindfold: A Review of Mock Jury Research," Psychological Bulletin, (1977), 323-339.

[41] William Bevan, Robert S. Albert, Pierre R. Loiseaux, Peter N. Mayfield, and George Wright, "Jury Behavior as a Function of the Prestige of the Foreman and the Nature of His Leadership," Journal of Public Law, 7 (Fall, 1958), 419-449.

[42] See references in fn. 32. In addition, there may be confusion in the minds of the jury regarding inadmissable testimony as seen in John C. Reinard and Rodney A. Reynolds, Journal of the American Forensic Association, 15 (Fall, 1978), 91-109.

[43] Freda Adler, "Socioeconomic Factors Influencing Jury Verdicts," New York University Review of Law and Social Change, 3 (Winter, 1973), 1-10; Ronald M. Friend and Michael Vinson, "Leaning Over Backwards: Juror's Responses to Defendants' Attractiveness," Journal of Communication, 24 (Summer, 1974), 124-129; Harold M. Hoffman and Joseph Brodley, "Jurors on Trial," Missouri Law Review, 17 (June, 1952), 235-251; David Landy and Elliott Aronson, "The Influence of the Character of the Criminal and His Victim on the Decisions of Simulated Jurors," Journal of Experimental Social Psychology, 5 (April, 1969), 141-152; Herman E. Mitchell and Donn Byrne, "The Defendant's Dilemma: Effects of Jurors' Attitudes and Authoritarianism on Judicial Decisions," Journal of Personality and Social Psychology, 25 (1973), 123-129; Eloise C. Snyder, "Sex Role Differential and Juror Decisions," Sociology and Social Research, 55 (July, 1971), 442-448; Fred L. Strodtbeck, Rita M. James, and Charles Hawkins, "Social Status in Jury Decisions," American Sociological Review, 22 (December, 1957), 713-719; Fred L. Strodtbeck and Richard Mann, "Sex Role Differentiation in Jury Deliberations," Sociometry, 19 (March, 1956), 3-11; and H.P. Weld and E.R. Danzig, "A Study of the Way in Which a Verdict is Reached by a Jury," American Journal of Psychology, 53 (October, 1940), 518-536.

[44] The videotape may be ordered from the Court Practice Institute, 30 W. Washington Boulevard, Chicago, Illinois, 60602. Other taped trials are available as well.

[45] Copies of the questions are available from the author.

[46] Harvey C. Couch, "Writing the Appellate Brief," Practical Lawyer, 17 (December, 1971), 27-38.

[47] Milton Dickens and Ruth E. Schwartz, "Oral Argument Before the Supreme Court: Marshall v. Davis in the School Segregation Cases," Quarterly Journal of Speech, 57 (February, 1971), 32-42; Thorrell B. Fest, "Oral Aspects of Appellate Argument," Rocky Mountain Law Review, 22 (April, 1950), 273-288; John C. Godbold, "Twenty Pages and Twenty Minutes --Effective Advocacy on Appeal," Southwestern Law Journal, 30 (1976), 801-819; and Robert H. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Cases Presentations," American Bar Association Journal, 37 (November, 1951), 801-804, 861-864.

[48] Richard E. Crable,"Methods of Argumentation and Judicial Judgment," Journal of the American Forensic Association, 12 (Winter, 1976), 113-120; Stephen B. Jones, "Justification in Judicial Opinion: A Case Study," Journal of the American Forensic Association, 12 (Winter, 1976), 121-129; Robert A. Leflar, Internal Operating Procedures of the Appellate Courts (Chicago: American Bar Foundation, 1976), Chapter 3; David A. Rabin, "Gottlieb's Model of Rule-Guided Reasoning: An Analysis of Griswold v. Connecticut," Journal of the American Forensic Association, 15 (Fall, 1978), 77-90; and Akira Sabonmatsu, "Darrow and Rorke's Use of Burkeian Identification Strategies in New York v. Gitlow," Speech Monographs, 38 (March, 1971), 36-48.

[49] In addition to numerous textbooks and journal articles in communication on nonverbal messages, see Ray L. Birdwhistell, "Nonverbal Communication in the

Courtroom: What Message is the Jury Getting?" in Holmes, Persuasion: The Key to Damages, op. cit., see fn. 9, pp. 189-204; Stephan H. Peskin, "Nonberbal Communication in the Courtroom," Trial Diplomacy Journal, 3 (Spring, 1980), 8-9 and 3 (Summer, 1980), 6-7, 55; and John Stefano, "Body Language and Persuasion," Litigation, 3 (Summer, 1977), 31-33, 54-55.

[50] Robert T. Cunningham, Jr., "Videotape Evidence: Technological Innovation in the Trial Process," Alabama Lawyer, 36 (April, 1975), 238-247; John J. Loftus, "The Role of Videotape in the Criminal Court," Suffolk University Law Review, 10 (Summer, 1976), 1107-1140; James L. McCrystal, "Videotape Trial Comes of Age," Judicature, 57 (May, 1974), 446-449; James L. McCrystal, "Videotaped Trials: A Primer," Judicature, 61 (December-January, 1978), 250-256; James L. McCrystal and Ann B. Maschari, "Will Electronic Technology Take the Witness Stand?" University of Toledo Law Review, 11 (Winter, 1980), 239-254; Gerald Miller, David Bender, Thomas Florence, and Henry Nicholson, "Real Versus Reel: What's the Verdict?" Journal of Communication, 24 (Summer, 1974), 99-111; Alan E. Morrill, "Enter the Videotape Trial," Insurance Law Journal, 1970 (July, 1970), 406-424; and Francis J. Taillefer, Ernest H. Short, J. Michael Greenwood, and R. Grant Brady, "Video Support in the Criminal Courts," Journal of Communication, 24 (Summer, 1974), 112-122.